IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 18,834

JESS GREEN, and THE NEZ PERCE INDIAN ASSOCIATION,
Plaintiff-Appellants

v.

ANGUS A. WILSON, ALBERT EZEKIEL, MOSES THOMAS, PHIL TYPES, ALLEN SLICKPOO, EARL M. GOULD, FRANK PENNEY, RICHARD HALFMOON and HARRISON LOTT,
Defendant-Appellees

On Appeal From An Order of The United States District Court For The District of Idaho, Central Division

BRIEF FOR DEFENDANT-APPELLEES

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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JURISDICTIONAL STATEMENT

The case was decided by the Court below by granting the motion of defendants-appellees to dismiss the complaint on the grounds, *inter alia,* that the court lacked jurisdiction over the subject matter and over two indispensable parties. Appellees' contentions that the District Court lacked jurisdiction are set forth in detail in the body of this Brief.

This Court has jurisdiction to review the judgment of the court below under 28 U.S.C. § 1291.

SUMMARY OF ARGUMENT

In this action appellants seek judicial intervention to upset the institutions of self-government established by the members of the Nez Perce Tribe of Idaho and recognized and approved by the Legislative and Executive Branches.

The principal allegations of the complaint are (1) that the Revised Constitution and By-Laws, under which the Tribal government is constituted, are illegal and unconstitutional, and (2) that the elected officers of the Tribe are misusing tribal funds by expending them upon such economic and social development projects as sewers and sanitary water facilities, community buildings for youth recreation and adult education, and the possible development of tourist facilities. The complaint seeks to compel appellees to restore these funds to the Tribal treasury so that they may be distributed per capita to appellants and other members of the Tribe.

The appellees moved the District Court to dismiss the complaint on four separate grounds, each of which was adequate to support the motion. The District Court granted the motion to dismiss. In this Brief appellees have presented each of the four grounds argued in the court below.

1. The Complaint Fails to State a Claim Upon Which Relief Can Be Granted

Those portions of the complaint which challenge the Revised Constitution and By-Laws fail to state a cause of action.

The forms and procedures of Indian tribal self-government are not subject to scrutiny in the courts. The rule uniformly adhered to is that the judiciary accepts the decisions of Congress or the Executive with respect to recognition of Indian tribal governments and their internal rules of administration. The Revised Nez Perce Constitution was approved by the Department of the Interior and the

appellees, as the duly elected governing body thereunder, are recognized by that Department.

Those portions of the complaint which allege that the Tribal officials abused their discretion by expending Tribal funds for community development projects also fail to state a claim upon which relief can be granted. The Revised Constitution clearly grants to the elected Tribal officials authority to expend Tribal funds for any purpose which will "promote and protect the health, education and general welfare of members of the Tribe." There is no precedent for a court substituting its judgment for that of tribal officials, acting with the approval of the Secretary of the Interior, as to the wisdom of specific expenditures of tribal funds.

2. The Court Below Lacked Jurisdiction Over the Subject Matter

The only possible ground of jurisdiction in the Court below is the existence of a question "arising under the Constitution, laws or treaties of the United States." An examination of the complaint demonstrates that no rights arising under the Constitution, laws or treaties of the United States are asserted.

Many previous cases involving suits by individual Indians against their tribes have been dismissed for lack of a Federal question. The courts have repeatedly held that disputes involving the use and distribution of tribal property must be resolved by internal tribal law and not in Federal courts.

3. The Complaint Failed to Join an Indispensable Party—the Nez Perce Tribe

This suit is in law and in fact an action against the Nez Perce Tribe. The named defendants were the nine elected officials of the Tribe. The complaint prays that the tribal Constitution be declared illegal and that all further expenditures of tribal funds be halted.

In similar cases where members of an Indian tribe have sought to sue a tribal officer in his official capacity, the courts have held the tribe to be an indispensable party. Since the Nez Perce Tribe is immune from suit, and cannot be joined, the complaint had to be dismissed.

4. The Complaint Failed to Join an Indispensable Party—the United States

Both major allegations of the complaint so affect the vital interests of the United States that it must be joined as a party. The Revised Constitution and By-Laws were approved by the Secretary of the Interior and constitute the working agreement between the United States and the Nez Perce Tribe concerning the manner in which the affairs of the Tribe shall be conducted. Any action to set that agreement aside should not proceed without the United States as a party.

The allegations of misuse of tribal funds also affect the vital interests of the United States. The expenditures specified in the complaint were made with the approval of the Secretary of the Interior, acting in accordance with Congressionally established procedures. The Secretary has encouraged the Tribe to expend its judgment funds for useful, community development projects of the type of which appellants complain.

To halt the expenditure of Tribal trust funds, and to declare illegal the expenditures already made with the approval of the Secretary, is clearly to frustrate the program of the United States for the development of the Nez Perce Tribe and so affect its vital interests that the United States is an indispensable party.

For all of the foregoing reasons, any one of which is sufficient, the District Court was clearly correct in dismissing the complaint.

ARGUMENT

I. THE FACTUAL BACKGROUND

This suit was commenced by an individual member of the Nez Perce Tribe and an association which is said to consist of "enrolled, unemancipated members of the Nez Perce Indian Tribe." R. 4. The suit seeks to enjoin the members of the elected governing body of the Tribe, the Nez Perce Tribal Executive Committee, from carrying out community development projects engaged in by the Nez Perce Tribe in conjunction with a number of Federal agencies, and further seeks to require these Tribal officials to distribute all Tribal funds among the members per capita.

The Nez Perce Tribal Executive Committee was first constituted under a Constitution and By-Laws, approved by the Bureau of Indian Affairs on April 2, 1948, and ratified by the Tribe on April 30, 1948. The 1948 Constitution and By-Laws are set forth in Appendix A to this Brief. Article IX of this Constitution permitted amendments by majority vote of the qualified voters of the Tribe or majority vote of the General Council. *Id.* at p. 4a. Article II, Section 6 of the By-Laws fixed the quorum requirement of the General Council at fifty members. *Id.* at p. 6a.

After more than a decade of operation under the 1948 Constitution, members of the Tribe took steps to overhaul that document. In 1959 a special Amendments Committee was established, which frequently conferred with officials of the Bureau of Indian Affairs on proposed revisions of the Tribe's organic document. R. 21. After two years of discussion and advance clearance by the Bureau of Indian Affairs, the comprehensive Revised Constitution and By-Laws were submitted to and were approved by the Tribal General Council on May 6, 1961. R. 21. At that meeting 132 members were present and voting. R. 20. The new Constitution was approved by the Commissioner of In-

dian Affairs on June 27, 1961. R. 22. As the Nez Perce Tribe had not adopted the Indian Reorganization Act, sometimes called the "Wheeler-Howard Act" (Act of June 18, 1934, 48 Stat. 984), the Commissioner approved the document under the powers vested in him by the provisions of 25 U.S.C. § 2. R. 23.

The root cause of this suit is the money made available to the Nez Perce Tribe and to Nez Perce Indians on the Colville Reservation in the State of Washington under judgments entered by the Indian Claims Commission. These judgments, entered in 1959 and 1960, totaled $7,157,605. R. 4. By appropriate legislation, Congress authorized the division of the funds between the two groups in stated proportions and provided that the money may be "advanced or expended for any purpose which is authorized by the respective tribal governing bodies *and approved by the Secretary of the Interior.*" Act of April 24, 1961, 75 Stat. 45, herein referred to as Public Law 87-24 (emphasis supplied).

Following the enactment of Public Law 87-24, the Nez Perce Tribal Executive Committee entered into discussions with the Secretary of the Interior concerning an acceptable plan for utilization of its share of the judgment funds. In accordance with a resolution of the Tribal General Council, the Tribal officials proposed the per capita distribution of most of the judgment funds to the members of the Tribe. The Department of the Interior, on the other hand, took the position that the bulk of the funds should be used to develop economic opportunities on the Nez Perce Reservation.

The Department's position on per capita payments was defined by the Task Force on Indian Affairs, appointed by Secretary of the Interior Stewart L. Udall in 1961:

> Another potential source of capital for resource development is the judgment money from cases now pending before the Indian Claims Commission. Every

> effort should be made to see that this money is not dissipated on a per capita payment basis to the tribal members. The pressure from Indians living away from the reservation is often too much for tribal councils to resist, with the result that all or a substantial portion of the judgment funds are distributed to individuals. It should be emphasized to tribes that the claims awards are made to the entire group, rather than to the individual members, and the Secretary of the Interior should, except in rare cases, give first priority to group uses of the awards. If planning for resource development is carried out prior to the time the judgment is made, the hands of the tribal council and the Secretary will be considerably strengthened in resisting the pressures for per capita payments. [*Report to the Secretary of the Interior by the Task Force on Indian Affairs,* p. 13, on file at the Library of the Department of the Interior, Washington, D. C.]

With the Tribal membership asking for a per capita distribution and the Interior Department opposing such payments, the Nez Perce Tribal Executive Committee and the Department finally reached a compromise. As provided in Public Law 87-24, agreement of both parties was necessary to expend any of the funds. The compromise provided for the distribution of $750 per capita and the retention of the remainder of the funds for use in a program to improve the economic and social conditions of the Tribal membership. R. 25-26.[1] In reviewing this action the Associate Commissioner of Indian Affairs subsequently stated:

> When the governing body, in the case of the Nez Perce the Nez Perce Tribal Executive Committee, authorized a $750 per capita distribution from this fund—a de-

[1] On March 25, 1963, while the appellants' motion to dismiss was pending in the District Court, the Bureau of Indian Affairs approved an additional distribution of $500 for each member of the Tribe, subject to certain safeguards against waste. Thus, each member of the Tribe has now received $1,250 from the judgment funds at a total cost of more than $2,500,000. This is nearly half of the net amount which the Nez Perce Tribe of Idaho received under the apportionment formula in Public Law 87-24.

> cision approved by the Secretary—only that portion required to pay each enrolled member of the Nez Perce Tribe was individualized. The Nez Perce Tribal Executive Committee has stated that the balance of the funds would be used to invest in projects which will provide lasting benefits to the tribal members. To reach this goal, the Executive Committee appointed a Development Advisory Committee, which is now engaged in determining the projects best suited to improve social and economic conditions of the tribe.
>
> We fully appreciate the concern of the members of the Indian tribes living away from the reservation and hope that wherever possible they too will benefit from successful on-reservation programs. Much of our Indian population has moved to areas of greater economic opportunity throughout the entire United States and this has created different interests and different opinions as to how tribal money should be used. *It has been our experience that per capita distributions of sizeable amounts have not always produced desirable or long-lasting benefits.* [R. 24, emphasis supplied.]

The object of this suit is to prevent the Nez Perce Tribal Executive Committee from carrying out that portion of its agreement with the Department of the Interior which calls for the expenditure of funds for economic and social improvement and thus to frustrate the stated policies of the United States Government. The specific projects of which appellants complained are:

(1) a sanitation facilities program under the Indian Sanitation Act (42 U.S.C. § 2004a), financed jointly by the United States Public Health Service and the Nez Perce Tribe;

(2) the construction of two community buildings under the Public Works Acceleration Act of 1962 (76 Stat. 541), financed jointly by the Community Facilities Administration and the Nez Perce Tribe;

(3) a tourist enterprise on which the Area Redevelopment Administration has expended funds and on

which the United States Park Service and the Nez Perce Tribe may collaborate in the future.[2]

In asking the Federal courts to enjoin the expenditure of Tribal funds on projects of this nature, appellants evidently hope to obtain a distribution to all members of a "pro-rata portion" of all Tribal funds. Complaint, Section V, R. 5.

II. APPELLANTS' CONTENTIONS

In support of their request that the District Court enjoin the expenditure of Tribal funds on projects of community betterment, appellants advanced only two legal arguments. These were:

(1) that the Revised Constitution and By-Laws of the Nez Perce Tribe are "illegal and invalid" and that appellees, members of the Nez Perce Tribal Executive Committee, therefore lack authority to act as the governing body of the Tribe; (Complaint, Sections III and IV, R. 4-5);[3]

(2) that if defendants have authority to act as the Nez Perce Tribal Executive Committee, they have "exceeded the bounds of discretion" (Brief for Appellants, p. 28) in that they have failed to credit the individual accounts of plaintiffs and other Tribal members with a pro-rata portion of Tribal funds and by allegedly expending or intending to expend funds on a forestry project, a tourist enterprise, the construction of outdoor privies and the construction of community buildings (Complaint, Sections V and VIII, R. 5-6).

Appellees moved to dismiss the complaint on four separate grounds, any one of which would justify dismissal,

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[2] A forestry project referred to in the Complaint (R. 5), was considered but not put into effect.

[3] It is worthy of special note that at the time the suit was brought only defendants Gould, Thomas and Types had been elected under the 1961 Constitution. The other defendants had been elected to their positions under the 1948 Constitution.

namely: (1) failure to state a claim upon which relief can be granted; (2) lack of jurisdiction because the complaint does not state a Federal question; (3) failure to join an indispensable party, the Nez Perce Tribe; and (4) failure to join an indispensable party, the United States. The District Court granted appellees' motion.

In this brief appellees will discuss the four grounds for dismissal separately. Where appropriate, appellees will distinguish in their discussions of the applicable law between appellants' two major contentions: (1) illegality of the Tribal government, and (2) misuse of Tribal funds.

III. THE DISTRICT COURT WAS CORRECT IN DISMISSING THE COMPLAINT

A. The Complaint Fails to State a Claim Upon Which Relief Can Be Granted

(1) *The alleged illegality of the Tribal government.*

The specific grounds for the alleged invalidity of the Tribal Constitution, as set forth in Section IV of the Complaint, are:

(a) the Constitution "was adopted by a vote of 132 Tribal members out of approximately 2,000 Tribal members, far short of the required number;"[4]

(b) the Constitution denies "Indians living off the reservation the right to vote or hold office, a violation of the United States Constitution;"

(c) the Constitution "places the sole governing power in the hands of a nine-man executive committee, a denial of due process;"

(d) the Constitution "purports to give the Nez Perce Tribe powers under that certain act of Congress appearing at 48 Stat. 984, commonly known as the Wheeler-Howard Act." R. 5.

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[4] The membership total cited by appellants includes minors, who are ineligible to vote.

Before examining the law applicable to these assertions, the relevant facts and the position of the appellants should be clarified.

(a) The present Nez Perce Tribal Constitution was indeed adopted by a vote of 132 Tribal members, voting at a duly called meeting of the General Council of the Nez Perce Tribe. R. 22. This action took place under Article IX of the 1948 Constitution, which permitted amendments by "majority vote of the General Council" (Appendix A, p. 4a), and under Article II, Section 6 of the 1948 By-Laws, which provided that 50 members constitute a quorum of the General Council (*Id.*, at p. 6a).

As 132 votes were cast on the 1961 Constitution and the quorum requirement was 50, it is clear that the provisions of the 1948 By-Laws were complied with. To be meaningful, appellants' contention must, therefore, be construed as a challenge to the quorum provision of the 1948 By-Laws. Appellants are apparently asking, at this late date, that the courts rewrite the 1948 By-Laws by increasing, through judicial fiat, the quorum requirement.

It is worth noting that the Constitution of the State of Idaho provides that Constitutional amendments proposed by the Legislature shall be adopted "if a majority of the electors shall ratify the same . . ." Art. XX, Sec. 1. This language has been construed to mean that a proposed amendment is adopted if approved by a majority of the electors *who vote on that particular issue*, even if that is less than a majority of the qualified electors who vote for State officers in the same election. *Green* v. *State Board of Canvassers,* 5 Idaho 130, 47 Pac. 259 (1910). Thus, Idaho has no minimum requirement for voter participation for the adoption of a constitutional amendment.

(b) With respect to residence, the present Tribal Constitution provides in Article V, Section 5, that in order to vote at a General Council a member must have resided for the preceding six months in the Nez Perce area as established by the Treaty of 1855

(12 Stat. 957). R. 9-10. That area extends far beyond the present Reservation and encompasses such distant communities as Moscow, Idaho; Pomeroy, Washington; and Enterprise, Oregon.

The right to hold Tribal office is limited by Article VI, Section 3 to members who resided for one year in the Nez Perce Area established by the Treaty of 1863 (14 Stat. 647). R. 11.

By comparison, the Constitution of the State of Idaho provides that in order to be eligible to vote a person must be a resident of the State for 6 months preceding any election (Art. VI, § 3), and that candidates for governor, lieutenant governor, secretary, auditor, treasurer and attorney general must be residents of the State for two years preceding their election (Art. V, § 3).

What appellants seem to be seeking is a decree declaring the residence requirements of the 1961 Constitution for voting and for election to office invalid, even though they are less restrictive than the comparable provisions in the Constitution of the State of Idaho.

(c) The Revised Constitution does indeed place the authority to conduct the day-to-day Tribal business affairs in the hands of the elected Tribal Executive Committee. Article VI, Section 1, R. 10. Similar delegations of authority to elected officials are commonplace throughout our system of government, the New England town meeting constituting a rare exception.

(d) Plaintiffs were in error when they alleged that the Nez Perce Tribe purported to derive authority from the Indian Reorganization (Wheeler-Howard) Act, 48 Stat. 984 (1934). As the Court will see from an examination of the Record, the Tribal Constitution makes no reference whatever to that Act. R. 7-20. Moreover, the Associate Commissioner of Indian Affairs has stated expressly that the Nez Perce Constitution was approved by the Commissioner of Indian Affairs under the authority of 25 U.S.C. § 2. R. 23. In their

> brief before this Court, appellants appear to accept appellees' assertion that the Nez Perce Constitutions were approved by the Commissioner of Indian Affairs under the authority vested in him by 25 U.S.C. § 2. Brief for Appellants, p. 12. Since appellees now agree with appellants that the Indian Reorganization Act is inapplicable to the Nez Perce Tribe, this is not an issue in controversy in this law suit.

By challenging the validity of the Tribal Constitution, appellants are in effect, asking this Court to set aside the decisions of the Tribal membership as to their form of government and the Commissioner's approval of these decisions, and to prescribe judicial standards concerning (1) how much voter participation should be required to adopt a Tribal Constitution, (2) what are reasonable residence requirements for Tribal elections, and (3) how much authority a tribe should delegate to its officials. The District Court agreed with appellees' contention that questions of this nature are beyond the purview of the judiciary.

In framing the provisions of its Tribal Constitution the Nez Perce Tribe exercised its broad authority of self-government, which has long been recognized under our law. A landmark opinion of the Solicitor of the Department of the Interior, concerning the powers of Indian Tribes, states the underlying principle as follows:

> Since any group of men, in order to act as a group, must act through forms which give the action the character and authority of group action, an Indian tribe must, if it has any power at all, have the power to prescribe the forms through which its will may be registered. The first element of sovereignty, and the last which may survive successive statutory limitations of Indian tribal power, is the power of the tribe to determine and define its own form of government. Such power includes the right to define the powers and duties of its officials, the manner of their appointment or election, the manner of their removal, the rules they are to observe in their capacity as officials, and the

> forms and procedures which are to attest the authoritative character of acts done in the name of the tribe. [Sol. Op., Oct. 25, 1934, 55 I.D. 15, 30, reprinted in *Cohen, Handbook of Federal Indian Law* 126 (1941)]

The power of tribal self-government "also includes the power to interpret its own laws and ordinances, which interpretations will be followed by the federal courts." *Cohen, Handbook of Federal Indian Law 126* (1941).[5]

The right to define the powers of its officials and to specify the manner of their election is thus within the power of an Indian tribe. It includes the power to "classify various types of membership and qualify not only the property rights, but the voting rights of certain members." Sol. Op., Oct. 25, 1934, 55 I.D. 15, 35, citing 19 Ops. Att'y. Gen. 389 (1888). It has also been held that absent Congressional legislation or Secretarial regulations to the contrary, an Indian Tribe may adopt or amend its constitution "if a majority of those voting in the election voted in favor of its adoption, and the number of voters participating in the election would be immaterial." Sol. Op., Nov. 21, 1952, 61 I.D. 82, 85.

Appellees do not contend that the exercise of Indian self-government is not wholly free from Federal control. But they do contend that the decision of whether, and to what extent, a group of aboriginal residents of the United States is to be recognized as a self-governing body is a political question which, under our Constitution, is exclusively delegated to Congress and the Executive Branch. The Supreme Court said in the leading case of *United States* v. *Holliday,* 70 U.S. (3 Wall) 407, 419 (1866):

> The facts in the case . . . show distinctly "that the Secretary of the Interior and the Commissioner of Indian Affairs have decided that it is necessary, in

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[5] Felix S. Cohen, author of the *Handbook,* has been described by the Supreme Court of the United States as "an acknowledged expert in Idnian law." *Squire* v. *Capoeman,* 351 U.S. 1, 8-9 (1956).

> order to carry into effect the provisions of said treaty, that the tribal organization should be preserved." In reference to all matters of this kind, *it is the rule of this court to follow the action of the executive and other political departments of the government,* whose more special duty it is to determine such affairs. *If by them those Indians are recognized as a tribe, this court must do the same.* If they are a tribe of Indians, then, by the Constitution of the United States they are placed, for certain purposes, within the control of the laws of Congress. [Emphasis supplied].

This principle was reaffirmed in *United States* v. *Sandoval,* 231 U.S. 28, 46 (1913). When questions have arisen as to the authority of specific individuals to act on behalf of their tribe, the Supreme Court has, applying the same rule, held that the judiciary would abide by the decision of the other branches of Government. *Fellows* v. *Blacksmith,* 60 U.S. (19 How.) 366 (1857); *United States* v. *New York Indians,* 173 U.S. 464 (1899).

Applying this rule, the lower courts have repeatedly held that internal tribal disputes cannot be resolved in Federal courts. The Court of Claims in a recent case involving rival tribal factions and two sets of attorneys, each claiming to represent the tribe, refused to decide the matter and referred the question of which attorneys properly represented the tribe to the Commissioner of Indian Affairs. *McCauley* v. *United States,* 113 F. Supp. 689 (Ct. Cl. 1953). In the recent case of *State* v. *Bertrand,* 378 P. 2d 427 (Wash. 1963) the Supreme Court of Washington refused to determine which of two rival factions had authority to speak for an Indian tribe under a Washington law which permitted Indian tribes to accept State law enforcement on their reservations. The question, said the Court, was for the political officials of the State to determine. See also *Pueblo of Santa Rosa* v. *Fall,* 273 U.S. 315 (1927) where the Supreme Court looked to internal tribal laws and custom to determine whether a purported tribal spokesman had authority to act on behalf of the tribe.

To summarize, the framing of a tribal Constitution is, in the first instance, an internal tribal affair. See generally, *Cohen, Handbook of Federal Indian Law* 126 (1941). Tribal rights of home rule can, of course, be modified by Congress. See e.g. 25 U.S.C. § 476; *Iron Crow* v. *Oglala Sioux Tribe,* 231 F. 2d 89 (8th Cir. 1956). Furthermore, Congress has vested supervisory authority over "all matters arising out of Indian relations" in the Commissioner of Indian Affairs, under the direction of the President and the Secretary of the Interior. 25 U.S.C. § 2. The Commissioner's authority under 25 U.S.C. § 2 is exceedingly broad. *Rainbow* v. *Young,* 161 Fed. 835, 838 (8th Cir. 1908); *Armstrong* v. *United States,* 306 F. 2d 520 (10th Cir. 1962). See also *Iron Crow* v. *Ogallala Sioux Tribe,* 129 F. Supp. 15, 19 (D.S.D. 1955), *aff'd.* 231 F. 2d 89 (8th Cir. 1956). The power to manage "Indian relations" must encompass the power to approve Tribal constitutions, for a principal purpose of these constitutions is to provide the framework for a continuing relationship between the Tribe and the United States. R. 23 The Commissioner and Secretary have interpreted § 2 as giving them the power to approve Tribal Constitutions (*Ibid.*) and their interpretation is entitled to "considerable weight". *Ketchikan Packing Co.* v. *Seaton,* 267 F. 2d 660, 663 (D.C. Cir. 1959).

As applied to the facts of the instant case, the foregoing rules lead to the inescapable conclusion that that portion of the complaint alleging the illegality of the Nez Perce government fails to state a claim upon which relief can be granted. This is an action to strike down the self-governing institutions of the Nez Perce people and to declare invalid the instruments by which the Executive and Legislative branches recognize the elected representatives as authoritative spokesmen for the Tribe. Appellees have shown that the quorums, residence requirements for voting and holding office, and the delegation of political power to an elected representative body, as provided for in the Nez

Perce Constitutions of 1948 and 1961, are reasonable in fact and, in any event, beyond the authority of this Court to review. Appellants can cite no case in over 175 years of United States history, in which any court attempted to substitute its judgment of what constitutes proper political institutions of an Indian tribe for that of the members of the tribe, on the one hand, or the Congress and Executive on the other. The decisions indicate, on the contrary, that Court's will invariably defer in such matters to the internal rules of the tribe itself, or to Congress and the Executive.

(2) *The alleged misuse of Tribal funds*

Assuming that the Nez Perce Tribal Executive Committee possesses the legal authority to act as the governing body of the Nez Perce Tribe, has it abused its discretion by appropriating funds for community improvement projects?

Article VI, Section 1 of the Revised Constitution states that the "affairs of the Nez Perce Tribe of Idaho shall be administered by a Tribal Executive Committee." R. 10. Article VIII, Section 1(b) grants the Committee the power "to promote and protect the health, education and general welfare of members of the Tribe." R. 13. Article VIII, Section 2, grants the Committee the power, subject to the approval of the Secretary of the Interior, "to manage the property of the Nez Perce Tribe" (subsection a), and "to engage in any business or other economic transaction that will further the economic development of the Tribe and its members" (subsection b). R. 14. Finally, Public Law 87-24 provides that the Tribe's judgment funds may "be advanced or expended for any purpose that is authorized by the [Nez Perce Tribal Executive Committee] and approved by the Secretary of the Interior." 75 Stat. 45.

A self-evident corollary of the doctrine of inherent tribal self-government previously discussed, is the principle that

tribal laws enacted in the exercise of the tribe's powers of self-government are beyond the purview of judicial review. This rule was clearly laid down by the Supreme Court in *Talton* v. *Mayes,* 163 U.S. 376 (1896) and has been recently reaffirmed in *Barta* v. *Oglala Sioux Tribe,* 259 F. 2d 553 (8th Cir. 1958), *cert. den.,* 358 U.S. 932 (1959); *Native American Church* v. *Navajo Tribal Council,* 272 F. 2d 131 (10th Cir. 1959); *Oliver* v. *Udall,* 306 F. 2d 819 (D.C. Cir. 1962), *cert. den.* 372 U.S. 908 (1963). The doctrine is so far-reaching that even the actions of tribal governments which allegedly violate the Constitution of the United States are said to be beyond the scope of judicial review. *Talton* v. *Mayes, supra; Native American Church* v. *Navajo Tribal Council, supra.*

Appellants have cited no legal authority for the proposition that the fact that an Indian governing body has expended or plans to expend funds on community improvement projects gives rise to a judicially cognizable claim. See *Massachusetts* v. *Mellon,* 262 U.S. 447 (1926). On the contrary, where, as here, the law has granted approval powers to the Secretary of the Interior, it is clear that supervisory authority is to be exercised by the Executive and not by the Judiciary. *Prairie Band of Pottawatomie Indians* v. *Puckkee,* 321 F. 2d 767 (10th Cir. 1963).

B. The District Court Lacked Jurisdiction Over the Subject Matter

1. *General rules of jurisdiction apply.*

The Federal courts are, of course, courts of limited jurisdiction and can take cognizance only of those matters which Congress has entrusted to them by statute. There is no statute giving Federal courts jurisdiction over all causes of action involving Indians or Indian tribes, or simply because the contracts or property of an Indian tribe are involved. *Martinez* v. *Southern Ute Tribe,* 249 F. 2d 915, 917 (10th Cir. 1957), *cert. den.* 356 U.S. 960 (1958). Hence, the jurisdiction of this Court must depend upon generally applicable rules of Federal jurisdiction.

Since the complaint states that "all parties hereto . . . reside in the above entitled Judicial District" (R. 4), diversity of citizenship does not exist. The only other possibility for Federal jurisdiction is the existence of a Federal question; that is, a controversy which "arises under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331. See *Gustason* v. *California Trust Co.,* 73 F. 2d 765 (9th Cir. 1934), *cert. den.* 296 U.S. 607 (1935).

2. *The complaint does not raise a Federal question.*

The existence of a federal question must be found in the well-pleaded allegations of the complaint. *Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U.S. 667, 673 (1950). A cause of action does not "arise under the Constitution, laws or treaties of the United States" unless "the complaint is drawn . . . so as to claim *a right to recover* under the Constitution and laws of the United States." *Bell* v. *Hood,* 327 U.S. 678, 680 (1946) (emphasis supplied). It is not sufficient merely to allege some vague, undefined Federal right. The right claimed must "clearly appear." *Consolidated Freightways* v. *United States Truck Lines,* 216 F. 2d 543 (9th Cir. 1954), *cert. den.* 349 U.S. 905 (1955). "To bring a case within the statute [28 U.S.C. § 1331], a right or immunity created by the Constitution of the United States must be an element, *and an essential one,* of plaintiff's cause of action." *Gully* v. *First National Bank,* 299 U.S. 109, 112 (1936) (emphasis supplied).

By these tests, it clearly appears that no Federal question is presented in this action. While the complaint makes vague reference to "the laws and Constitution of the United States Government" (R. 4), no specific portion of the Constitution is cited, and no claim of right or immunity created by any law or the Constitution is clearly asserted.

Appellants purport to derive some comfort from the fact that *appellees,* in support of their motion to dismiss, relied upon two Federal statutes, namely 25 U.S.C. § 2,

and Public Law 87-24. Brief for Appellants, p. 11. But federal-question jurisdiction depends upon the allegations of a well pleaded complaint. Jurisdiction cannot be conferred by the defendant's answer, much less by a memorandum in support of a motion to dismiss. Nor can the plaintiff obtain federal-question jurisdiction by anticipating in its complaint an affirmative defense that might bring Federal law into issue. *Skelly Oil Co.* v. *Phillips Petroleum Co., supra.*

3. *The complaint could not raise a Federal question.*

What is perhaps equally important is the fact that under the existing legal rules governing judicial supervision of the internal affairs of an Indian tribe, no claim "arising under the Constitution or laws of the United States" could be here asserted.

The judgments of the Indian Claims Commission were rendered in favor of the Nez Perce Tribe, and not its individual members. *Nez Perce Tribe* v. *United States,* 8 Ind. Cl. Com. 759 (1960); *Nez Perce Tribe* v. *United States,* 8 Ind. Cl. Com. 300 (1959). The funds authorized by those judgments, like the land which they represent, is held in common by the Tribe. Appellees' repeated assertions to the contrary notwithstanding (e.g., Brief for Apellant, p. 18), no individual tribal member has an individualized, vested right in communal tribal property. *Minnesota Chippewa Tribe* v. *United States,* 315 F. 2d 906, 913-14 (Ct. Cl. 1963); *Cohen, Handbook of Federal Indian Law* 183-84 (1941). See letter of Associate Commissioner, R. 23.

In this situation it is perfectly clear that no Federal question is presented. The right to use and dispose of tribal property remains solely in the Tribe, except as limited by Congress. Our courts have clearly and repeatedly "declined to interfere with the decisions of tribal authori-

ties on property disputes internal to the tribe." *Federal Indian Law* 443 (1956), a U. S. Department of the Interior revision of Felix S. Cohen's *Handbook of Federal Indian Law,* citing cases. Disputes arising out of the use and distribution of tribal property must be resolved by tribal law and custom. In short, the issue presented arises under the laws and Constitution of the Nez Perce Tribe, and not the laws, treaties or Constitution of the United States.

Three recent decisions will conclusively establish the proposition that no Federal question is here involved:

a. The recent case of *Prairie Band of Pottawatomie Tribe* v. *Puckkee,* 321 F. 2d 767 (10th Cir. 1963) is virtually identical to the instant action. There certain members of the Tribe brought suit against other named members of the Tribe to declare plaintiff's rights in certain tribal judgment funds, which had been entrusted to tribal control under statutory language identical with that involved in the instant case. See Act of September 6, 1961, 75 Stat. 474. The Court held no Federal question was presented.

b. In *Washburn* v. *Parker,* 7 F. Supp. 120 (W.D. N.Y. 1934) an action was brought to restrain a tribal court of the Seneca Nation from resolving a dispute between two tribal members concerning the partition of certain real estate. The Court refused to entertain the action on the grounds that "in the absence of congressional action bestowing upon the individual Indians the right to litigate internal questions relating to their property rights in the federal courts, and conferring jurisdiction upon this court to determine such controversies, this court should not assume jurisdiction," *Ibid.,* quoting *United States* v. *Seneca Nation,* 274 Fed. 946, 951 (W.D. N.Y. 1921).

c. In a pair of cases, strikingly similar to the instant case, an alleged member of the Southern Ute Tribe in Utah sued the Tribe and the members of its governing body to enforce her claim that she was entitled to participate in a per capita distribution by the Tribe. *Martinez*

v. *Southern Ute Tribe,* 249 F. 2d 915 (10th Cir. 1957), *cert. den.* 356 U.S. 960 (1958); *Martinez* v. *Southern Ute Tribe,* 273 F. 2d 731 (10th Cir. 1960), *cert. den.* 363 U.S. 847 (1960). The Tenth Circuit twice held that the complaints did not state a cause of action arising under the Constitution, laws or treaties of the United States and dismissed the suits for lack of jurisdiction over the subject matter.

The foregoing cases conclusively demonstrate that the allegations of abuse of discretion and misuse of tribal funds in the appellants' complaint raise no issues arising under the laws of the United States. Public Law 87-24 directs that the Nez Perce judgment funds may be "advanced or expended for any purpose that is authorized by the respective tribal governing bodies and *approved by the Secretary of the Interior.*" 75 Stat. 45 (emphasis supplied). Precisely the same provision was contained in the statutes involved in the *Ute* and *Pottawattomie* cases. See *Martinez* v. *Southern Ute Tribe,* 273 F. 2d at 733; *Prairie Band of Pottawattomie Tribe* v. *Puckkee,* 321 F. 2d at 769.

While *Congress* has undoubted authority to intervene in the internal affairs of Indian tribes, it has long been clear to our courts that "Congress at no time intended to provide for federal supervision of private civil actions by Indians." *Martinez* v. *Southern Ute Tribe,* 249 F. 2d at 919. This is an "intra-tribal controversy, over which Federal court jurisdiction has been traditionally denied." *Prairie Band of Pottawatomie Tribe* v. *Puckkee,* 321 F. 2d at 770 (10th Cir. 1963). See also *Native American Church* v. *Navajo Tribal Council,* 272 F. 2d 131 (10th Cir. 1959); *Talton* v. *Mayes,* 163 U.S. 376 (1896).

In their brief appellants have cited a number of cases which they claim establish the proposition that courts have accepted jurisdiction over causes of action involving Indian funds and property. Brief for Appellants, p. 13. This

is undeniably true. But each of the cases cited by appellants was either brought by an Indian tribe and raised a Federal question on the face of the complaint or was brought pursuant to a special jurisdictional Act of Congress. The cases cited by appellants are distinguished in the margin.[6]

The conclusion is inescapable that the complaint fails to raise a Federal question and must therefore be dismissed for lack of jurisdiction.

C. The Complaint Fails to Join An Indispensable Party—the Nez Perce Tribe

This suit is, in law as well as in fact, an action against the Nez Perce Tribe. The nine individuals named in the complaint were, as the complaint alleges, the nine members of the Nez Perce Tribal Executive Committee.

They are, as examination of the complaint demonstrates, sued in their official capacity for their official acts. More-

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[6] In *Oglala Sioux Tribe* v. *Barta,* 146 F. Supp. 917 (D.S.D. 1956), *aff'd.* 259 F. 2d 553 (8th Cir. 1958), *cert. den.* 358 U.S. 932 (1959), the Federal question arose from the fact that the tribe was suing under a tribal constitution which had been authorized by Act of Congress to collect a tax levied pursuant to that constitution. No comparable circumstances exist here.

Skokomish Indian Tribe v. *France,* 269 F. 2d 555 (9th Cir. 1959) was an action to quiet title brought by the tribe to enforce certain rights under a treaty with the United States. The Federal question was self-evident.

Sakezzie v. *Utah Indian Affairs Commission,* 198 F. Supp. 218 (D. Utah 1961), *modified* 215 F. Supp. 12 (D. Utah 1963), was an action by a group of individual Indians living in Utah to enforce their rights under an Act of Congress which obligated the State of Utah to expend certain oil royalties for the use and benefit of the plaintiffs. Act of March 1, 1933, 47 Stat. 1418. The case clearly arose under a law of the United States.

Healing v. *Jones,* 174 F. Supp. 211 (D. Ariz. 1959), *cert. den.* 373 U.S. 758 (1953) was brought under a special Act of Congress, expressly authorizing a land dispute between the Navajo and Hopi Tribes to be tried before a three judge court and conferring jurisdiction on the court to entertain the action. Act of July 22, 1958, 72 Stat. 402.

United States v. *Pierce,* 235 F. 2d 885 (9th Cir. 1956), was an action to compel the United States to issue trust patents to certain lands the plaintiffs had selected as allotments. Jurisdiction was based upon 25 U.S.C. § 345, which expressly authorizes such actions.

over, the relief requested demonstrates that the Tribe is the real subject of this suit. Any decree entered by this Court would so directly affect the Nez Perce Tribe that it "would be wholly inconsistent with equity and good conscience" to hold a trial without joining the Tribe as a party. *Shields* v. *Barrow,* 58 U.S. (17 How.) 130, 139 (1855).

The tests of whether a party is indispensable have been stated by the Supreme Court as follows:

> Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience [are indispensable parties]. [*Shields* v. *Barrow,* 58 U.S. (17 How.) 130, 139 (1855)].

In another case the Supreme Court stated that a party is indispensable if:

> [t]he court would find itself in the position of having made a decree it could not enforce, of attempting to give relief which is beyond its power, because the party whose action was necessary to that relief was not a party to the suit. [*Kendig* v. *Dean,* 97 U.S. 423, 424 (1878)].

See generally, 3 *Moore, Federal Practice* 2150 (1963).

This principle was expressly applied in *Barnes* v. *United States,* 205 F. Supp. 97 (D. Mont. 1962), where a member of the Crow Indian Tribe sued the Chairman of the Tribe, the Commissioner of Indian Affairs, the Secretary of the Interior and others to annul and set aside a resolution of the Crow Tribal Council and enjoin the defendants from carrying out the resolution. That case, too, concerned the use and distribution of tribal funds.

The District Court granted defendant's motion to dismiss on the ground, *inter alia,* that the Crow Tribe was an

indispensable party over which the Court lacked jurisdiction. The Court, in a scholarly opinion, stated:

> An Indian tribe is not subject to suit without the consent of Congress. *Nor may a tribe be sued indirectly by suing its tribal officers* or the United States as trustee or guardian of the tribe. No law has been cited and none can be found which would subject the Crow Tribe to a suit of the nature involved in this action. [205 F. Supp. at 100 (emphasis supplied)].
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> * * *
>
> . . . *the Crow tribe may not be sued indirectly by suing a tribal officer.* [205 F. Supp. at 101]

See also *Thebo* v. *Choctaw Tribe,* 66 Fed. 372 (8th Cir. 1895); *Adams* v. *Murphy,* 165 Fed. 304 (8th Cir. 1908). Compare, *Tower Hill Connellsville Coke Co.* v. *Piedmont Coal Co.,* 33 F. 2d 703, *rehearing den.* 35 F. 2d. 179 (4th Cir. 1929), *cert. den.* 260 U.S. 607 (1930); (in suit against corporate directors to compel payment of dividends the corporation is an indispensable party); *Gray* v. *Reuther,* 99 F. Supp. 992 (E.D. Mich. 1951), *aff'd per curiam* 201 F. 2d 54 (6th Cir. 1952) (in suit against individual union officers for an accounting of their control of local union funds the local union is an indispensable party); *Hanson* v. *Hutcheson,* 217 F. 2d 171 (7th Cir. 1954) (same); *Green* v. *Brophy,* 110 F. 2d 539 (D.C. Cir. 1940).[7]

The law is clear beyond dispute that if an indispensable party cannot be joined, the suit must be dismissed. *Shields* v. *Barrow, supra; Hanson* v. *Hutcheson, supra; Gray* v. *Reuther, supra.* See generally, 3 *Moore, Federal Practice,*

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[7] None of the cases cited by appellants is in the remotest way relevant to the question of whether the Nez Perce Tribe is an indispensable party defendant. *Sakazzie* v. *Utah Indian Affairs Commission,* 198 F. Supp. 218 (D. Utah 1961), *modified* 215 F. Supp. 12 (D. Utah 1963) was a suit by individual Indians to enforce their rights against a governmental commission created by the State of Utah. No Indian tribe was involved. In *Choctaw and Chickasaw Nations* v. *Seitz,* 193 F. 2d 456 (10th Cir. 1951), *cert. den.* 343 U.S. 919 (1952), and *Lane* v. *Pueblo of Santa Rosa,* 249 U.S. 110 (1919) the Tribe was the party plaintiff, hence no question as to its indispensability was raised.

2205 (1963). Defendants submit that this is the inescapable result in this case.

The indispensable party—the Nez Perce Tribe of Idaho —is not subject to suit in the Federal Courts. In a recent case, the Fourth Circuit succinctly stated the law on this question:

> The rule that a tribe of Indians under the tutelage of the United States is not subject to suit without the consent of Congress is too well settled to admit of argument. [*Haile* v. *Saunooke,* 246 F. 2d 293, 297 (4th Cir.) *cert den. sub. nom. Haile* v. *Eastern Band of Cherokee Indians,* 355 U.S. 893 (1957)].

The court relied upon such cases as *Thebo* v. *Choctaw Tribe,* 66 Fed. 372 (8th Cir. 1895), and *United States* v. *United States Fidelity & Guarantee Co.,* 309 U.S. 506, 512 (1940), wherein the Supreme Court stated "[t]hese Indian nations are exempt from suit without Congressional authorization." There is no Act of Congress authorizing suits such as the instant one against an Indian tribe. See *Cohen, Handbook of Federal Indian Law* 283 (1941). Since the Nez Perce Tribe is an indispensable party and since the Tribe cannot be sued and joined, the case must be dismissed.

D. The Complaint Fails to Join An Indispensable Party—the United States

Each of the principal allegations of the complaint, the illegality of the Nez Perce Tribal Government and the misuse of tribal funds, so affects the vital interests of the United States that it must be joined as a party if the suit is to proceed. Since the United States cannot be joined, dismissal of the action was required. The interest of the United States as to each of appellants' principal allegations, will be examined separately.

1. *Alleged illegality of the Tribal government.*

Since 1832, Congress has vested in the Commissioner of Indian Affairs the power of "management of all Indian

affairs and of all matters arising out of Indian relations." 4 Stat. 564, now codified as 25 U.S.C. § 2. In 1950, Reorg. Plan No. 3, §§ 1, 2, 64 Stat. 1262, transferred this power to the Secretary of the Interior. It is in the exercise of this statutory power and responsibility that the Department of the Interior approved and authorized the scheme of government for the Nez Perce Tribe set forth in the Revised Constitution of the Nez Perce Tribe. R. 23. If the District Court had considered the merits of appellants' case, it would have reviewed the actions of the Department of the Interior. If it had ruled the Tribal Constitution invalid, it would have stricken down a document which was not only approved by the Department of the Interior, but which defines the relationship of the Department to the Nez Perce Tribe. The Revised Nez Perce Constitution constitutes the working agreement between the Tribe and the United States concerning the manner in which the affairs of the Nez Perce Tribe shall be managed. If that working agreement is to be suspended or revoked, it seems clear a final decree could not be made without directly affecting the interest of the United States, and that it would be "wholly inconsistent with equity and good conscience" to hold a trial without joining the United States as a party. *Shields* v. *Barrow,* 58 U.S. (17 How.) 130, 139 (1855).

2. *The alleged misuse of Tribal funds.*

Appellants' second major contention is that even if appellees properly constitute the Nez Perce Tribal Executive Committee, their action in expending funds on community improvement programs is improper and should have been enjoined by the District Court. It is submitted that with regard to this allegation, too, the United States is an indispensable party.

As has been pointed out previously, the funds in question belong to the Nez Perce Tribe, and not to its individual members. Just as stockholders in a corporation have no

direct interest in corporate profits until a dividend is declared, members of the Tribe have no direct interest in Tribal funds. The matter has been succinctly stated by the Associate Commissioner of Indian Affairs:

> Many Nez Perce Indians, especially those living away from the reservation are of the opinion that the recent judgment awarded the Nez Perce Tribe gives each individual a "legal share". Neither the order of judgment nor the subsequent legislation (Act of April 24, 1961, 75 Stat. 45), provided for individualizing the total judgment awarded. The interlocutory order of judgment entered on December 31, 1959 found that the petitioners were entitled to recover on behalf of the *Nez Perce Tribe.* The Act of April 24, 1961, *supra* provided that these funds may be used or expended for any purpose authorized by the tribal governing body and approved by the Secretary of the Interior. [R. 23-24].

The Secretary of the Interior, when approving the initial per capita payment of $750, stated "we anticipate that the Tribe will be able to use the balance of its available funds for development programs that will be of lasting benefit to the Tribe and its members." R. 25. He added, "with the bulk of the money to be programmed for the productive and enduring benefit of the Tribe and its members, we can anticipate better times ahead for the Nez Perce Indians." R. 26.

To enjoin the expenditure of these funds for development programs that have been encouraged and approved by the Secretary, pursuant to his authority under Public Law 87-24, would surely be to affect the vital interests of the United States.

The Supreme Court faced a wholly comparable problem in *Morrison* v. *Work,* 266 U.S. 481 (1925). There a class suit was brought on behalf of all Chippewa Indians against the Secretary of the Interior and other Government officials. The suit charged that the defendants had failed to make

certain per capita distributions of tribal trust funds, as required by a special law pertaining to the Chippewas. The Court found that the suit which sought "to interfere with its [the United States'] management and disposition of the lands or the funds by enjoining its officials would interfere with the performance of governmental functions and vitally affect the interests of the United States." *Id.* at 486. The Court consequently held the United States to be an indispensable party to the suit, and affirmed dismissal of the case on the ground that the United States had not consented to be sued. To the same effect is *First National Bank of Holdenville, Okla.* v. *Ickes,* 60 F. Supp. 366 (D. D.C. 1945), *aff'd* 154 F.2d 851 (D.C. Cir. 1946).

In the recent Crow case discussed above, *Barnes* v. *United States,* 205 F. Supp. 97 (D. Mont. 1962), the court addressed itself to this specific problem and pointed out that the Crow judgment fund could not be expended except upon approval of the Secretary of the Interior. The court then pointed out:

> Any decree which might be entered would require the Secretary to take action or refrain from taking action, "either by exercising directly a power lodged in him or by having a subordinate exercise it for him." It is well settled that in such a case the superior officer, here the Secretary of the Interior, is an indispensable party. [205 F. Supp. at 101]

Precisely the same situation exists in the instant case. See Pub. L. 87-24, 75 Stat. 45.

To restrain the expenditure of all tribal funds, as appellants request, would:

1. Cut off the expenditure of the tribal judgment funds and thus prevent the Tribe from accomplishing the development goals which the Secretary has described as an outstanding opportunity to provide "for the productive and enduring benefit of the tribe and its members." R. 26.

2. Prohibit the expenditure of all other tribal funds, including tribal trust funds, which are under the control of the Secretary of the Interior.

3. Preclude tribal expenditures to provide educational assistance and scholarships to tribal members.

4. Preclude expenditures to provide welfare assistance to needy tribal members.

5. Prevent expenditures to provide for the maintenance, protection and development of tribal property and resources.

It is self-evident that the frustration of the foregoing would substantially thwart the programs of the United States to advance the economic and social conditions of the Nez Perce Tribe.

Since the United States is for the foregoing reasons an indispensable party and since it has not consented to be sued in a case such as the instant one, the complaint must be dismissed.[8] See authorities cited in Section III, C of this Brief, *supra.*

CONCLUSION

In their lengthy conclusion appellants have suggested that if they are deprived of the opportunity to litigate the merits of this complaint, such a result would be a consequence of their status as Indians. This is most certainly not the case. The fact of the matter is that the relief which they seek, judicial revision of the Constitution and By-laws of the Nez Perce Tribe and judicial division per capita of Tribal assets, would not be available to them if they were non-Indians seeking such relief against their local government or even against the directors of a voluntary associa-

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[8] The cases cited by plaintiff appear to be wholly inapplicable. *Choctaw and Chickasaw Nations* v. *Seitz*, 193 F. 2d 456 (10th Cir. 1951), *cert. den.* 343 U.S. 919 (1952), was an action by the tribes to establish title to certain lands. The Court, relying upon well established precedent, held that a tribe could sue to recover lands without joining the United States as a party.

tion. As it is, individual tribal members are protected against abuse of discretion by the tribal leadership by the supervisory authority of the Secretary of the Interior.

For the foregoing reasons the decision of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Counsel for Defendant-Appellees

APPENDIX

APPENDIX A

1948 Constitution and By-Laws of the Nez Perce Tribe In Idaho

Preamble

We, the members of the Nez Perce Tribe in Idaho, in order to exercise our tribal rights and promote our common welfare do hereby ordain and establish this Constitution and By-Laws.

Article I—Purpose

The purpose shall be to protect and promote the interests of the Nez Perce Indians, to develop cooperative relations with the Office of Indian Affairs, and to cooperate with State and local governments.

Article II—Name

This tribal organization shall be called "The Nez Perce Tribe".

Article III—Territory

The jurisdiction of the Nez Perce Tribe shall extend to all lands within the original confines of the Nez Perce Reservation boundaries as established by treaty; and to such other lands as may hereafter be acquired by or for the Nez Perce Indians of Idaho.

Article IV—Membership

Section 1. The membership of the Nez Perce Tribe shall consist as follows, of:

(a) All persons of Nez Perce Indian blood whose names appear on the official census roll of the Nez Perce Tribe as of July 1, 1940; provided, that corrections may be made in the said roll by the Tribal Executive Committee within five years from the adoption and approval of this Constitution, subject to the approval of the Secretary of the Interior or his authorized representative.

(b) All children, born to members of the Nez Perce Tribe, who are of at least one-fourth degree Nez Perce Indian blood.

Section 2. The Executive Committee of the Tribe shall have power to make rules, subject to approval by the Secretary of the Interior or his authorized representatives, governing the adoption of new members or the termination of membership in the Tribe.

Article V—Governing Body

Section 1. The governing body of the Tribe shall be a Tribal Executive Committee consisting of (9) nine members elected by the General Tribal Council.

Section 2. The Executive Committee shall meet immediately following the General Council each year for the purpose of electing from its own membership: (a) a Chairman, (b) a Vice-Chairman, (c) a Secretary, (d) a Treasurer, (e) an Assistant Secretary-Treasurer, and (f) a Chaplain.

Article VI—Nominations and Elections

Section 1. The election of Tribal Executive Committeemen each year shall be supervised by the Chairman, Secretary and Teller selected by the General Council.

Section 2. The present Tribal Business Committee shall continue as the governing body until a new Tribal Executive Committee shall have been elected and installed in office under this Constitution.

Section 3. In the election of Committeemen by the General Council the three nominees receiving the highest number of votes shall hold office for three (3) years, the three nominees with the next highest number of votes shall hold office for two (2) years, the three nominees with the next highest number of votes shall hold office for one (1) year. Thereafter elections for the Tribal Executive Committee

shall be held every year and such members elected shall serve for a term of three (3) years, or until their successors are duly elected.

Section 4. All elections shall be held in accordance with instructions and rules laid down by the Tribal Executive Committee.

Section 5. Any enrolled member of the Nez Perce Tribe who is twenty-one (21) years of age or over and has had a permanent residence on the Reservation for at least one year immediately preceding an election shall be entitled to vote in said election.

Section 6. The General Council officers at an election of Committeemen shall certify as to the results of said election and the eligibility of electees.

Article VII—Vacancies and Removal from Office

Section 1. Should a vacancy occur in the Tribal Executive Committee either by death, resignation or removal, the Tribal Executive Committee shall declare the position vacant and appoint a successor to serve until the next regular election.

Section 2. Any member or officer of the Tribal Executive Committee may be removed from office if convicted of any felony, or upon absenting himself from three (3) successive meetings without sufficient reason acceptable to the Committee. Removal of such member or members of the Tribal Executive Committee shall be by a majority vote of the Committee.

Section 3. The Tribal Executive Committee may, by a majority vote, expel any member for neglect of duty or gross misconduct. Before any vote for expulsion is taken in the matter, such member or officer shall be given a written statement of the charges against him at least five (5) days before the meeting of the Tribal Executive Committee before he is to appear, and he shall be given an oppor-

tunity to answer charges at the designated Committee meeting where the decision of the said committee shall be final.

Article VIII—Powers and Duties of the Tribal Executive Committee

The Tribal Executive Committee shall have the following powers subject to any limitations imposed by the Statutes or the Constitution of the United States:

(a) To represent the Tribe and to negotiate with Federal, State and local governments and to advise with representatives of the Interior Department on appropriations, projects and legislation that affect the Tribe.

(b) To manage all affairs of the Nez Perce Tribe, including the administration of Tribal lands, funds, timber and other resources, under appropriate contracts, leases, permits, and loan or sale agreements.

(c) To promulgate and enforce ordinances governing the conduct of members of the Tribe and providing for the procedures of the Tribal Executive Committee.

(d) To exercise any rights and powers heretofore vested in the Nez Perce Tribe but not expressly referred to in this Constitution, or any powers that may in the future be delegated by any agency of local, State or Federal government.

Article IX—Amendments

This Constitution and By-Laws may be amended by a majority vote of the qualified voters of the Tribe at an election called for that purpose by resolution of the Executive Committee or majority vote of the General Council, such amendments to become effective when approved by the Commissioner of Indian Affairs or his duly authorized representative.

By-Laws of the Nez Perce Tribe

Article I—Duties of the Officers

Section 1. The Chairman as chief executive officer of the Executive Committee and the Tribe, shall preside over all meetings of the Executive Committee and the General Council, affix his signature to official documents, countersign warrants duly drawn by the Treasurer against the tribal funds and shall vote only in case of a tie.

Section 2. The Vice-Chairman shall preside at meetings and otherwise act in full capacity of the Chairman in the absence of the Chairman.

Section 3. The Secretary shall conduct all correspondence, issue public notices, take minutes, record official actions, etc., of the Executive Committee and the General Council and affix his signature to official documents.

Section 4. The Treasurer shall accept, receipt for and safeguard all funds of the Tribe under his custody as directed by the Executive Committee, and keep complete record of receipts and expenditures. He shall be a bonded officer and shall not disburse any funds of the Tribe except as duly authorized by the Executive Committee and he shall report on his accounts and all financial transactions at meeting upon request of the General Council or the Executive Committee.

Section 5. The Assistant Secretary-Treasurer shall assist, or serve in the absence of either the Secretary or the Treasurer.

Section 6. The duties and compensation of all appointive committees and officers of the Tribe shall be defined by resolution or motion of the Executive Committee.

Article II—Meetings

Section 1. The Executive Committee shall meet in regular session on second Tuesday of each month.

Section 2. Special meetings of the Executive Committee may be called by the Chairman, or upon written request of at least five members of the Executive Committee.

Section 3. At any meeting of the Executive Committee duly called, five members shall constitute a quorum.

Section 4. At all meetings of the General Council or the Executive Committee, Robert's Rules of Order shall govern.

Section 5. The Tribal Executive Committee shall set dates of the General Council meetings each year.

Section 6. At meetings of the General Council, fifty (50) members present shall constitute a quorum.

Article III—Ratification

Section 1. This Constitution and By-Laws shall become effective upon ratification by a majority vote of those adult members of the Nez Perce Tribe, who shall vote in General Council assembled as authorized by the Commissioner of Indian Affairs.

Section 2. This Constitution and By-Laws are herewith approved by the Assistant Commissioner of Indian Affairs and submitted for ratification by the adult members of the Nez Perce Tribe, State of Idaho, in general assembly.

Signed: JOHN H. PROVINSE
Assistant Commissioner of
Indian Affairs

April 2, 1948
Washington, D. C.

Certification of Adoption

Pursuant to an order, approved April 2, 1948, by the Assistant Commissioner of Indian Affairs, the attached Constitution and By-Laws was submitted for ratification to the adult members of the Nez Perce Tribe in general assembly, and was on April 30, 1948, duly ratified by a vote of 93 for and 77 against.

Sgd. Sam Slickpoo
Chairman, General Council

Sgd. Allen Moody
Secretary, General Council

Sgd. Frank Raibou
Teller, General Council

Sgd. Richard A. Halfmoon
Election Judge

Sgd. Lillian Smith
Election Judge

Sgd. Archie Phinney
Supt., Northern Idaho Agency